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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARTHUR LEE ALFRED, II et al.,

Plaintiffs,

v.

WALT DISNEY PICTURES,

Defendant,

Case No. 2:18-CV-08074-CBM-ASx

**DEFENDANT WALT DISNEY
PICTURES' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT RE SUBSTANTIAL
SIMILARITY**

*[Filed concurrently with Statement of
Uncontroverted Facts and Conclusions
of Law, Declaration of Robin S. Gray,
Declaration of Rebecca Cline;
Declaration of Diego Parras;
Declaration of David Jessen, Notice of
Lodging; Proposed Order; and
Proposed Judgment]*

Date: October 19, 2021

Time: 10:00 a.m.

Dep't: Courtroom 8B

Judge: Hon. Consuelo Marshall

1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2 PLEASE TAKE NOTICE that, on October 19, 2021, at 10:00 a.m., in
3 Courtroom 8B of the United States District Court, Central District of California, 350
4 West 1st Street, Los Angeles, California, 90012, or as soon thereafter as this matter
5 may be heard by the Honorable Consuelo Marshall, Defendant Walt Disney Pictures
6 will and hereby does move pursuant to Federal Rule of Civil Procedure 56 for
7 summary judgment in favor of Defendant.

8 The First Amended Complaint (“FAC,” Dkt. 112) alleges that Defendant’s
9 2003 motion picture *Pirates of the Caribbean: The Curse of the Black Pearl*
10 infringes Plaintiffs’ copyright in a 2000 screenplay. Both works are based on
11 Disney’s theme park ride. After filtering out generic, unprotectable elements and
12 elements that are stock features or *scenes a faire* of the pirate genre, no reasonable
13 factfinder could conclude that the works are substantially similar. And, because
14 Plaintiffs concede that their screenplay is an unauthorized derivative work based on
15 Disney’s ride, it is entirely unprotectable under the governing extrinsic test for
16 substantial similarity. Thus, the FAC fails to state a claim of copyright infringement
17 because the works are not substantially similar as a matter of law.

18 This motion is based upon this Notice of Motion and Motion; the attached
19 Memorandum of Points and Authorities; the Statement of Uncontroverted Facts and
20 Conclusions of Law; the Declarations of Jordan D. Segall, Rebecca Cline, Diego
21 Parras, and David Jessen; any reply papers that may be submitted by Defendant; oral
22 argument of counsel; all pleadings and papers on file in this action; and such other
23 matters as properly may come before the Court for its consideration.

24 This motion is made following the conference of counsel pursuant to L.R. 7-
25 3, which took place on August 30, 2021.

26
27
28

1 DATED: September 7, 2021

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2003, Walt Disney Pictures (“WDP”) released *Pirates of the Caribbean: The Curse of the Black Pearl* (the “Motion Picture”), an acclaimed adaption of Disney’s famous and long-running Pirates of the Caribbean theme-park ride (the “Ride”). This lawsuit, brought over *fourteen years* after the Motion Picture’s release, makes an untenable claim of copyright infringement regarding that Motion Picture. In essence, Plaintiffs Arthur Lee Alfred III and Ezequiel Martinez, Jr. argue that their *unauthorized* adaptation of the Ride in the form of a derivative screenplay (the “Screenplay”)—submitted with full knowledge that WDP was itself developing a movie based on the Ride—precluded WDP from adapting its own intellectual property or employing the tropes and *scenes a faire* of the pirate genre that suffuse the Ride.

Application of both controlling precedent and the Ninth Circuit’s guidance on this very case to the uncontroverted material facts compels summary judgment against Plaintiffs. The first step of the governing extrinsic test for substantial similarity requires that this Court filter out (1) Plaintiffs’ unauthorized, extensive, and conceded copying of Disney’s Ride and (2) elements common to the pirate genre. That filtration defeats any claim of substantial similarity between the two works, and hence any infringement claim. That is what this Court recognized at the pleading stage in dismissing Plaintiffs’ original complaint, holding that the works were not substantially similar. (*See* Dkt. 93.) The Ninth Circuit reversed, but its disagreement centered on its ruling that expert testimony could aid in clarifying whether the limited elements the works share in common “are unprotected generic, pirate-movie tropes.”

WDP now offers expert testimony surveying the genre and confirming this Court’s conclusion that any similarities between the works are *scenes a faire* and well-worn genre tropes. Plaintiffs’ expert, in disregard of the Circuit’s instructions, made no effort to survey the genre or distinguish between protectable and unprotectable elements. The Court should again hold the works are not substantially similar.

1 It is important to emphasize how unusually weak Plaintiffs’ case is. Plaintiffs
 2 *concede* they prepared an unauthorized adaptation of WDP’s intellectual property.
 3 They pleaded that they “envision[ed] their screenplay incorporating the basic elements
 4 of the Pirates of the Caribbean ride.” (Dkt. 1 ¶ 26.) When pitching it to WDP, they
 5 described it as “‘Goonies’ meets ‘Pirates of the Caribbean’ ... with the image and
 6 expectations families associate with the Disney ride.” (Dkt. 112-2 at 1.) Their pitch
 7 acknowledged they had taken not only “the basic elements” of the Ride and its “image
 8 and expectations,” but also specific expressions, including the song “Yo Ho (A
 9 Pirate’s Life for Me)” and other “Ride references.” (*Id.*) The Screenplay copied the
 10 Ride’s title, tagline (“Sail with the wildest crew that ever sacked the Spanish Main!”),
 11 dialogue (*e.g.*, “Dead men tell no tales!”), scenes (*e.g.*, the bride auction), and settings
 12 (*e.g.*, a “cavern like the DISNEYLAND RIDE, ‘PIRATES OF THE CARIBBEAN’”).
 13 (*See* Dkt. 1-1 (hereafter “Screenplay”) at 1, 10, 21, 98.) Plaintiffs visualized the
 14 Screenplay with a “sizzle reel” that used unauthorized Ride footage, including of its
 15 iconic skeletal pirates. (Dkt. 112-4.) Given the inevitable overlap between WDP’s
 16 adaption of the Ride and Plaintiffs’, Plaintiffs urged WDP that “yours can be the
 17 sequel!” (Dkt. 112-2 at 1.) Plaintiffs so clearly recognized that their Screenplay
 18 incorporated WDP’s intellectual property that they promised to remove all elements of
 19 the Ride from the Screenplay before marketing it elsewhere. (*Id.*)

20 As to generic elements, which are likewise unprotectable, Plaintiffs pleaded that
 21 the pirate genre is full of such tropes and listed numerous works establishing *scenes a*
 22 *faire* and common plots in the genre. (Dkt. 1 ¶¶ 8, 10.) Following remand from the
 23 Circuit, all that remained was for the parties to submit expert testimony as to what
 24 those tropes *were*, so they could be filtered from the Screenplay at the first step of the
 25 extrinsic test. WDP’s expert, James McDonald, comprehensively documented the
 26 genre’s tropes, illustrating their use in numerous famous works, including many taken
 27 from Plaintiffs’ own complaint. By contrast, Plaintiffs’ expert David Román made *no*
 28 effort to distinguish between protectable and unprotectable elements, and was

1 instructed by his counsel to *disregard* other works in the pirate genre. As a result,
 2 Román offered no meaningful response other than to question the pirate genre’s very
 3 existence—an untenable position given Plaintiffs’ original complaint, the Ninth
 4 Circuit’s mandate, common sense, and controlling precedent.

5 As is plain from a comparison of the works, and as the experts confirmed, the
 6 only overlap between the Screenplay and the Ride is merely a grab-bag of Ride
 7 elements and genre tropes that show up in both parties’ works. Equally plain is that
 8 despite both works using the Ride’s genre, setting, and content, the two works are
 9 radically different in plot, themes, dialogue, mood, pace, characters, and sequence of
 10 events. Under controlling precedent and the uncontroverted facts, this is not a close
 11 case. The Court should grant summary judgment for WDP.

12 **II. FACTUAL BACKGROUND AND THE PARTIES’ WORKS**

13 **A. Disney’s “Pirates of the Caribbean” Theme Park Ride**

14 Designed in the early 1960s by Walt Disney and his expert designers, and
 15 operating since 1967, Disneyland’s famed Pirates of the Caribbean ride takes guests
 16 through a rousing pirate adventure as riders observe “a bloodthirsty pirate crew in
 17 their sack of the Spanish Main.” (Defendant’s Statement of Uncontroverted Facts and
 18 Conclusions of Law (“DSUF”) 1.) Despite this violent premise, the Ride takes its
 19 pirates “away from the *scary* and towards the *humorous*.” (Cline Decl. Ex. B at 10.)

20 The Ride begins with a “prologue,” setting the stage for the adventure that
 21 follows. Riders depart from civilization, and as they near a waterfall leading into a
 22 cavern, a talking pirate captain’s skull warns that “there be plundering pirates lurking
 23 in every cove” ahead and intones, “Dead men tell no tales.” (DSUF 2–3.) Riders pass
 24 through scenes of cursed skeletal pirates (one steering a ship, another studying a map,
 25 another guzzling rum, another clutching gold coins) in treasure-filled caves, as an
 26 eerie voice repeats the “dead men tell no tales” refrain. (DSUF 4–5.) The prologue
 27 ends with the skeleton pirates telling of an “evil curse” upon the “bewitched treasure”:
 28 “No fear have ye of evil curses, says you?” (DSUF 6–7.)

1 Riders enter the Caribbean as a pirate ship attacks a port. (DSUF 8.) They
2 demand a surrender (“we’ll see you to Davey Jones”), then open fire. (DSUF 8.)

3 The town falls to the pirates, and riders watch as it is sacked. (DSUF 9.)
4 Riders pass a colorful “take a wench for a bride” auction, with drunken pirates
5 chanting “we wants the redhead.” (DSUF 10.) Riders continue through another
6 tunnel in the cave and they approach more pirates singing the now-famous song “Yo
7 Ho (A Pirate’s Life for Me).” (DSUF 11.) Comic elements include a pirate balancing
8 many hats on his head, a smiling pirate snuggling in the mud with pigs, and jailed
9 prisoners attempting to escape by using a bone to lure a dog with keys to their cell.
10 (DSUF 12–13.) In the finale, a pirate in a cave shoots a barrel of gunpowder marked
11 “EXPLOSIVO,” causing an explosion. (DSUF 14.) Riders emerge, pass an island
12 with buried treasure, and return to civilization, where they disembark. (DSUF 15–16.)

13 **B. Disney’s *Pirates of the Caribbean* Motion Picture**

14 In the late 1990s, WDP began adapting the Ride into a movie. (FAC ¶ 52.)
15 That Motion Picture tells the story of two protagonists, antiheroic pirate Jack Sparrow
16 and heroic blacksmith Will Turner, as they team up to rescue Will’s love interest (a
17 third protagonist, governor’s daughter Elizabeth Swann) and retake Jack’s ship (the
18 *Black Pearl*) from Captain Hector Barbossa and his cursed crew, who seek to reverse
19 the curse that has made them undying skeletons, as moonlight reveals. (DSUF 17.)

20 The Motion Picture incorporates not just the name, setting, genre, theme, and
21 tone of the Ride, but also many iconic elements: the “Yo Ho” song, the line “dead
22 men tell no tales,” the skeleton pirates and cursed treasure, the attack on a port town,
23 the redhead from the pirate auction, pirates sleeping with pigs, the prison dog with
24 keys, and the spooky, watery cavern. (DSUF 21–27.) It also draws on the Ride’s
25 overall structure: it has a prologue in which travelers leave the safety of civilization
26 for the pirate-infested Caribbean, despite grim warnings, followed by the attack on a
27 town, the capture of a woman, and a final battle in a cave. (DSUF 28–30.)

28 The Motion Picture begins with a child Elizabeth finding the only survivor of a

1 shipwreck, the unconscious young boy Will. (DSUF 32.) Realizing the medallion
2 Will wears marks him as a pirate, she steals it to protect him from being discovered
3 and arrested. (DSUF 33.) She then spots a pirate ship sailing off: the *Black Pearl*.
4 (DSUF 34.) A few years later, Elizabeth—now a young woman stifled by upper-class
5 mores in the town of Port Royal—is attending James Norrington’s promotion in the
6 British Royal Navy. (DSUF 35.) He asks her to marry him. Unable to breathe in her
7 corset, she falls over a cliff into the sea, revealing that she is wearing the stolen
8 medallion, which lets off a mysterious pulse. Jack Sparrow, who is in Port Royal to
9 steal a ship, sees her fall and reluctantly jumps in to save her. Norrington recognizes
10 him from a tattoo and attempts to arrest him for piracy. (DSUF 36–42.) Sparrow
11 flees but encounters Will. Like Elizabeth, he is stifled by social circumstances: in his
12 case, as an unappreciated apprentice to a drunken blacksmith. Will, who despises
13 pirates, engages Sparrow in a swordfight and captures him. (DSUF 43–46.)

14 That night, the *Black Pearl* attacks Port Royal. (DSUF 47.) Two pirates
15 capture Elizabeth, who conceals her identity by saying her last name is Turner. She
16 demands to see their captain. (DSUF 48–50.) Other pirates visit Sparrow in his jail
17 cell. As one pirate reaches through the bars of Sparrow’s cell, his arm becomes
18 skeletal in the moonlight. (DSUF 51–52.) Once aboard the *Pearl*, Elizabeth meets
19 the charming but evil Captain Barbossa and urges him to leave port; Barbossa agrees,
20 but takes Elizabeth hostage. (DSUF 53–54.) Will asks Sparrow for help and the two
21 set off for Tortuga to assemble a rescue crew. There, Will learns that Sparrow used to
22 be the *Pearl*’s captain, but Barbossa mutinied and marooned him. (DSUF 55–57.)

23 Back on the *Pearl*, Elizabeth dines with Barbossa. He explains his men found
24 the gold medallions, but realized too late that the treasure was cursed, turning them
25 into immortal skeletons. (DSUF 58–59.) When the *Pearl* reaches Isla de la Muerta,
26 where the gold is kept, Barbossa explains that to break the curse they must return the
27 medallions, as well as blood from everyone (or a descendant) who took them. (DSUF
28 60–61.) Barbossa believes he is missing a medallion and blood from a single

1 crewmember—Bill Turner, Will’s father. Thinking Elizabeth is Turner’s child
 2 (because she had the medallion and claimed to be named Turner), Barbossa cuts her
 3 hand and drops the bloody medallion into the chest. The curse is not broken. Will,
 4 hiding nearby with Sparrow, knocks out Sparrow and saves Elizabeth. Barbossa’s
 5 men capture Sparrow and chase Will, Turner’s true heir. (DSUF 62–66.)

6 The *Pearl* catches Will and Elizabeth. Will threatens to kill himself to make the
 7 curse unbreakable. Barbossa agrees to free Elizabeth and Sparrow, leaving them
 8 where he once marooned Sparrow. He keeps Will (and Sparrow’s crew) captive and
 9 returns to Isla de la Muerta to break the curse. (DSUF 67–70.) Marooned on an
 10 island, Sparrow and Elizabeth drink rum as Sparrow tells her the *Pearl* represents
 11 freedom. (DSUF 71.) He collapses, drunk, and Elizabeth uses the rum to build a fire.
 12 The Navy spots the smoke and rescues them. (DSUF 72–73.) Once aboard
 13 Norrington’s ship, Elizabeth pleads that he rescue Will. Finally, she promises to
 14 marry Norrington, who agrees to save Will “as a wedding gift.” (DSUF 74–75.)

15 Back on Isla de la Muerta, Barbossa prepares to shed Will’s blood and break the
 16 curse. Sparrow shows up, tells him the Navy is outside, and suggests he wait to break
 17 the curse until after using the crew’s immortality one last time to defeat the Navy.
 18 Sparrow proposes an alliance, with Barbossa in charge. Barbossa agrees, and his crew
 19 ambush Norrington’s ship by walking under the water, as they do not need to breathe.
 20 At the same time, Elizabeth boards the *Pearl* and frees Sparrow’s crew, who promptly
 21 sail off, leaving Elizabeth to head alone to Isla de la Muerta. (DSUF 76–81.)

22 Barbossa stabs Sparrow, but he survives—he took a medallion and is cursed
 23 with immortality. (DSUF 82.) Elizabeth saves Will, and they battle pirates. Sparrow
 24 and Will break the curse, just as Sparrow shoots Barbossa in the heart. (DSUF 84.)

25 Days later in Port Royal, the Navy prepares to hang Sparrow for piracy.
 26 Elizabeth declares her love for Will, and they help Sparrow escape to the *Pearl*. The
 27 movie ends with Sparrow, still an unredeemed pirate, whistling “Yo ho, a pirate’s life
 28 for me.” (DSUF 85–88.) They have separately found freedom via the pirate’s life.

1 **C. Plaintiffs’ *Pirates of the Caribbean* Screenplay**

2 Plaintiffs learned WDP was developing a movie based on the Ride, and decided
3 to pitch their own proposed adaptation of the Ride (the Screenplay) as a spec script.
4 Plaintiffs “envision[ed] their [S]creenplay incorporating the basic elements of the
5 *Pirates of the Caribbean* ride” while supplying additional story elements. (DSUF 95.)
6 In the August 9, 2000 cover letter to WDP accompanying the Screenplay, Plaintiffs’
7 agent Tova Laiter acknowledged Plaintiffs knew WDP had its own Ride adaptation in
8 the works, proposing “yours can be the sequel!” (DSUF 93.)

9 The Screenplay, entitled “Pirates of the Caribbean,”¹ had the tagline “IT ISN’T
10 JUST A RIDE ANY MORE” above the Ride’s famous talking pirate skull. (DSUF
11 97.) Plaintiffs visualized the Screenplay with Ride footage (DSUF 98–99) and
12 summarized their Screenplay in the cover letter to Disney as “‘Goonies’ meets [the]
13 ‘Pirates of the Caribbean’ [ride].” (DSUF 91.)

14 The Screenplay transposes the child characters from *The Goonies* (a 1985
15 Warner Bros. picture) into the setting, action, and feel of the Ride. (DSUF 91.) The
16 Screenplay centers on a gang of six wannabe-pirate kids (“the Rascal Scoundrels”),
17 ranging in age from seven to fifteen, who ultimately clean up and find a surrogate
18 family. The Screenplay, like the Ride and Motion Picture, starts with a prologue, but
19 it is very different: an extended action sequence involving a treasure map, a pirate
20 named Davey Jones, his pirate love interest Jane, his adversary Jack Nefarious, pirate
21 hunters (called “privateers”), and a sea monster. (DSUF 101–104.) The action turns
22 to the Rascals, who visit the Screenplay’s recreation of the Ride’s “auction of
23 wenches,” with the Ride’s exact dialogue. (DSUF 105–107.) They steal pirate
24 clothing and head back to Davey. Soon they meet the Screenplay’s translation of the
25 Ride’s skeleton pirates: pirates whose “faces are painted into TRIBAL SKULLS[.]”
26

27 ¹ Plaintiffs claim they wrote an earlier script titled *Pirates of the Spanish Main* (FAC
28 ¶¶ 48–49), but do not allege they provided it to Disney, do not claim the Motion
Picture infringes it, and were unable to produce it in discovery. Their claim concerns
only their *Pirates of the Caribbean* Screenplay.

(DSUF 110.) But these are not *actually* skeletons, as is demonstrated when a protagonist “swiftly kicks the skull-faced pirate dead in the balls.” (DSUF 111.)

Jones then sobers up, abandons piracy, gets the girl and adopts the kids; the kids drop the pirate monikers and aspirations, overcome stereotypical flaws (like a stutter), and gain parents. Together, they find the two halves of a map, solve various puzzles and booby traps, reach a cave full of treasure, and defeat the evil Captain Nefarious. The Screenplay ends with all of them cleaned up and dressed in privateer uniforms, a reconstructed nuclear family of sea police. (DSUF 112–115.) “I owe it all to them,” Davey says of his beloved scamps. (DSUF 116.) They have beaten piracy.

The Screenplay uses not only the Ride’s setting and theme, but also specific episodes and dialogue. For example, the Screenplay has a segment set in a “cavern like the DISNEYLAND RIDE, ‘PIRATES OF THE CARIBBEAN,’” where the protagonists ride a boat down a waterfall (as in the Ride) and pass skeletons impaled by swords into the walls (as in the Ride) while “[a]n eerie voice echoes throughout the cavern” delivering the Ride’s dialogue: “No fear have ye of evil curses says you ... no fear of plunderin’ pirates lurking in every cove, says you.” The Screenplay also uses the Ride’s song “Yo Ho,” tagline “Sail with the wildest crew that ever sacked the Spanish Main,” and refrain “dead men tell no tales.” (DSUF 117–121, 122–139.) The Rascal Scoundrels take their very name from a lyric in “Yo Ho.” (DSUF 132.)

III. PROCEDURAL BACKGROUND

A. This Court Dismisses Plaintiffs’ Complaint with Prejudice and the Ninth Circuit Calls for Expert Evidence on the Pirate Genre

Despite the Motion Picture’s 2003 release, Plaintiffs did not sue until late 2017. (See Dkt 1.) Like their 2000 pitch letter, Plaintiffs’ original complaint states their Screenplay is based on the Ride (*id.* ¶ 26), and acknowledges the existence of the pirate genre, going so far as to name 18 core pirate genre books and movies and recognizing these works are “among many others.” (*Id.* ¶¶ 8, 10.)

This Court granted WDP’s motion to dismiss on substantial similarity grounds,

1 holding that the “works are not substantially similar as a matter of law under the
 2 extrinsic test” and that “amendment would be futile.” (Dkt 93 at 18–19.) Applying
 3 the extrinsic test, the Court filtered out “unprotectable elements” and determined the
 4 plot, characters, themes, dialogue, mood, setting, and pace of the works were not
 5 substantially similar. (*Id.*)

6 Plaintiffs appealed, and the Ninth Circuit reserved and remanded so that the
 7 parties could submit expert evidence. *Alfred v. Walt Disney Co.*, 821 F. App’x 727
 8 (9th Cir. 2020). The Circuit recognized that this Court’s ruling rested on its
 9 determination that “many of the elements the two works share in common are
 10 unprotected generic, pirate-movie tropes.” *Id.* at 729. It then held that determination
 11 could be aided by expert testimony identifying which elements of the pirate genre
 12 were generic and unprotectable tropes and *scenes a faire*, and which elements were
 13 truly original. *Id.* (expert evidence “would aid in determining whether the similarities
 14 Plaintiffs identify”—such as “treasure stories that take place on islands and in jewel-
 15 filled caves” and “stories of betrayal by a former first mate”—are common in the
 16 pirate genre).

17 Following remand, Plaintiffs filed an amended complaint² that excised all
 18 references to the pirate genre having familiar tropes and canonical works. (Dkt. 112.)
 19 Their agent, Laiter, withdrew as a plaintiff. (*Id.*) The parties agreed to bifurcate fact
 20 discovery and treat substantial similarity as a threshold question suitable for resolution
 21 on summary judgment, informed by expert testimony regarding the pirate genre as the
 22 Ninth Circuit instructed. (*See* Dkt. 143.)

23 **B. Both Parties Disclose Expert Testimony on Substantial Similarity**

24 **1. Plaintiffs’ Expert David Román**

25 Plaintiffs submitted an expert report by David Román, a professor of
 26 comparative literature at USC. Román admits he is not an expert in the pirate genre

27 _____
 28 ² The FAC alleges similarities only as to the Motion Picture (Dkt. 1 ¶¶ 79–118), and drops any claim that the sequels are substantially similar to the Screenplay.

1 and has only a passing familiarity with it. (DSUF 155, 157.) He questions whether
 2 the pirate genre exists (DSUF 156), and his background with pirate works is so limited
 3 that, when asked what the last pirate novel he read was, he replied *Hamnet*—a 2020
 4 novel about Shakespeare’s family that features no pirates or piracy. (DSUF 170).

5 Román testified that he had never heard of the extrinsic test for substantial
 6 similarity, and that the “methodology” he applied was impressionistic. (DSUF 164–
 7 166.) The law “didn’t seem relevant to what [he] was tasked to do” (DSUF 163), and
 8 he could not recall his counsel telling him anything about the legal standards he
 9 should apply in reaching his opinions other than that he should disregard
 10 dissimilarities between the works. (DSUF 160–164.) In conducting his analysis of
 11 the two works, he also made no effort whatsoever to distinguish between their
 12 protectable and unprotectable elements. (DSUF 166.)

13 Despite the Ninth Circuit’s directive that expert testimony should help
 14 distinguish tropes of the pirate genre from original elements in the works, Román
 15 testified that he formed his expert opinion without reviewing any works in the genre.
 16 (DSUF 167, 169.) Perhaps recognizing this flaw, *after* forming his expert opinions
 17 Román reviewed two pirate works—the movies *Goonies* and *Cutthroat Island*, which
 18 Plaintiffs had admittedly copied. (DSUF 169.) Román stated repeatedly that he did
 19 not review other pirate works because Plaintiffs’ counsel asked him not to and
 20 informed him that “other pirate movies are irrelevant to this case.” (DSUF 148, 167.)

21 Finally, despite the undisputed fact that both works drew from the Ride, Román
 22 testified that he had never been on or even heard of the Ride, and did not review any
 23 footage of it in connection with forming his opinions. (DSUF 171, 177–178.)

24 **2. Defendant’s Expert James McDonald**

25 WDP submitted an expert report by James McDonald, a seasoned story analyst
 26 with over thirty years of professional experience reviewing almost a hundred films
 27 and television series. He had extensive familiarity with the pirate genre from prior
 28 engagements. (DSUF 185.) He supplemented that familiarity by surveying a wide

array of relevant novels and films in the genre, including those cited as canonical in Plaintiffs’ original complaint. (DSUF 180.) He is familiar with the extrinsic test for substantial similarity, and in his expert report he applies that test by identifying unprotectable elements and filtering them out. (DSUF 179, 182–184.) Based on his extensive knowledge of the pirate genre and the governing legal standard, McDonald conducted a “novelty analysis” that examined whether the similarities identified in Román’s report constitute original pirate genre elements, or instead are unprotectable tropes, stock elements, and *scenes a faire*. (DSUF 183.) His novelty analysis also considered which elements of the Screenplay and Motion Picture are unprotectable in the Screenplay because they originate from the Disney Ride. (DSUF 183.)

IV. LEGAL STANDARD

Summary judgment is appropriate “if the court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the non-moving party, that no reasonable juror could find substantial similarity.” *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990).³ Courts in the Ninth Circuit routinely grant summary judgment on substantial similarity in copyright cases. *See, e.g., Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985) (collecting cases); *Gallagher v. Lions Gate Entm’t Inc.*, 2015 WL 12481504, at *2 (C.D. Cal. Sept. 11, 2015) (same).

V. ARGUMENT

A. Unprotectable Material Must Be Filtered From the Screenplay, After Which Nothing Is Left

To state a copyright infringement claim a plaintiff must allege “(1) ownership

³ In *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1066–69 (9th Cir. 2020) (en banc), the Court repudiated the inverse-ratio rule and held that a showing that the defendant had a high degree of access to a copyrighted work does not lower the required substantial-similarity showing. In so holding, the Court overruled in part *Shaw*; *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072 (9th Cir. 2006); *Benay v. Warner Bros. Entm’t*, 607 F.3d 620 (9th Cir. 2010); *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003); *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003); and *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018), in a manner that makes Plaintiffs’ claims even weaker here, as some of those cases found no substantial similarity even after lowering the standard based on the inverse-ratio rule.

1 of a valid copyright, and (2) copying of constituent elements of the work that are
 2 original.” *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th
 3 Cir. 2006). To satisfy the second element, Plaintiffs must plausibly allege “that the
 4 two works are substantially similar.” *Id.* (internal quotation marks omitted).

5 Courts in the Ninth Circuit determine whether two narrative works are
 6 substantially similar using both the “intrinsic test,” which “examines an ordinary
 7 person’s subjective impressions,” and the “extrinsic test,” which is “objective in
 8 nature” and focuses on key similarities in elements of the works. *Funky Films*, 462
 9 F.3d at 1077. “[I]f the [plaintiff] cannot show a triable issue of fact under the extrinsic
 10 test,” the defendant “necessarily prevail[s] on summary judgment.” *See Cavalier v.*
 11 *Random House, Inc.*, 297 F.3d 815, 824 (9th Cir. 2002).

12 The extrinsic test focuses on “articulable similarities” as to eight factors: “plot,
 13 themes, dialogue, mood, setting, pace, characters, and sequence of events.” *Funky*
 14 *Films*, 462 F.3d at 1077. A court considering two narrative works must compare only
 15 *protectable* elements in the two works. *See Benay v. Warner Bros. Entm’t*, 607 F.3d
 16 620, 624 (9th Cir. 2010); *see also Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th
 17 Cir. 2003) (“[A] party claiming infringement may place ‘no reliance upon any
 18 similarity in expression resulting from unprotectable elements.’”).⁴ “[A]n author may
 19 claim protection only in those elements of a copyrighted work which are original with
 20 that author”; the claim cannot rest on elements “borrowed from another author, from
 21 the ‘public domain,’ or which are otherwise not a plaintiff’s original expression.”
 22 *Rice v. Fox Broad. Co.*, 148 F. Supp. 2d 1029, 1052 (C.D. Cal. 2001), *aff’d in part*,
 23

24 ⁴ Material *differences* between the works are also relevant. *See Benay*, 607 F.3d at 627
 25 (noting “important characters in the Film and the Screenplay who have no obvious
 26 parallel in the other work”); *Funky Films*, 462 F.3d at 1078 n.3 (noting “scenes [in
 27 plaintiffs’ screenplay] with no equivalent in [defendants’ television show]”: *id.* at
 28 1078 (“At first blush, these apparent similarities in plot appear significant; however,
 an actual reading of the two works reveals greater, more significant differences and
 few real similarities at the levels of plot, characters, themes, mood, pace, dialogue, or
 sequence of events.”); *see also Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1121 (9th
 Cir. 2018) (explaining that differences between photos were “significant” to the
 Court’s analysis).

1 *rev'd in part*, 330 F.3d 1170 (9th Cir. 2003). In applying the extrinsic test, the Court
 2 “filter[s] out and disregard[s] the non-protectable elements.” *Funky Films*, 462 F.3d
 3 at 1077. One work “may freely copy” another work’s ideas, “unoriginal
 4 components,” and other “unprotectable elements.” *Mattel, Inc. v. MGA Ent., Inc.*, 616
 5 F.3d 904, 913 (9th Cir. 2010).

6 Here, the process of filtering out unprotectable elements involves two steps.
 7 First, because both works adapt the same source material—Disney’s Ride—the Court
 8 must filter out aspects of the Screenplay that are unprotectable because they derive
 9 from Disney’s intellectual property. Second, the Court must filter ideas, “generic
 10 plot-lines,” *Funky Films*, 462 F.3d at 1077, “[s]cene-a-faire, or situations and
 11 incidents that flow necessarily or naturally from a basic plot premise,” “[f]amiliar
 12 stock scenes and themes that are staples of literature,” and “[h]istorical facts,” *Benay*,
 13 607 F.3d at 624–25. The uncontroverted expert analysis of WDP’s expert McDonald
 14 confirms what the Court concluded at the pleading stage: those aspects of the pirate
 15 genre cover any similarities between the Screenplay and the Motion Picture.

16 **1. The Screenplay Is or Includes Unprotectable Derivative Work.**

17 As explained above, Plaintiffs candidly concede that their Screenplay took
 18 significant content from Disney’s Ride. As an unauthorized derivative work, it is
 19 entirely unprotectable—meaning *all* elements must be filtered, leaving nothing that
 20 could be substantially similar between the Screenplay and the Motion Picture. At a
 21 minimum, the myriad specific copied elements must be filtered.

22 Plaintiffs’ claim is barred by the long-recognized rule that a plaintiff cannot
 23 “sue the party whose work he has infringed upon for infringement of his infringing
 24 derivative work.” *Anderson v. Stallone*, 1989 WL 206431, at *9 (C.D. Cal. Apr. 25,
 25 1989). As was true in *Anderson*, Plaintiffs have not “provide[d] a single case”
 26 supporting the “extraordinary proposition” that such a suit can go forward. *Id.* Such
 27 opportunistic copyright suits—though very rare—consistently fail. *See, e.g., Pickett v.*
 28 *Prince*, 207 F.3d 402, 406 (7th Cir. 2000) (Posner, J.).

1 Plaintiffs *pleaded* that they “envision[ed] their screenplay incorporating the
 2 basic elements of the Pirates of the Caribbean ride.” (Dkt. 1 ¶ 26.) In addition to
 3 these “basic elements” of genre, setting, and tone, Plaintiffs suffused the Screenplay
 4 with specific expressions from the Ride—copying that is beyond dispute because
 5 Plaintiffs expressly identified it in their pitch materials and in the Screenplay itself.
 6 Specific copying includes: (1) the name; (2) the tagline; (3) key scenes (e.g., the bride
 7 auction); (4) key locations (e.g., the cave); (5) the theme song, used with variations
 8 throughout the Screenplay to define different characters; (6) much of the dialogue; and
 9 (7) key motifs (e.g., skeleton pirates, including the iconic skeleton helmsman, and a
 10 ghostly, unseen voice giving the same grim warnings). (DSUF 122–139.) Exhibit D
 11 to the concurrently filed Declaration of Robin Gray fully details Plaintiffs’ copying of
 12 the Ride. In promising to remove these “Ride references” before pitching the
 13 Screenplay elsewhere (Dkt. 112-2), Plaintiffs tacitly and correctly admitted they had
 14 no authorization to use them.

15 Long before they dreamed up this suit, Plaintiffs also rightly admitted that their
 16 Screenplay was “‘Goonies’ meets ‘Pirates of the Caribbean’ ... with the image and
 17 expectations families associate with the Disney ride.’”⁵ (Dkt. 112-2.) Based on the
 18 extent of their copying, Plaintiffs—without having seen any of WDP’s materials for
 19 the Motion Picture, which was then in development—proposed that it could be a
 20 sequel to the Screenplay. (DSUF 93.) In other words, Plaintiffs knew that they had
 21 copied so much from the Ride that whatever the already-planned Motion Picture was,
 22 the Screenplay would necessarily share significant common elements with it.

23 Plaintiffs admitted—and cannot now dispute—that the Screenplay is full of
 24 specific expressions stolen from the Ride. And more generally, the Screenplay also
 25 has the Ride’s genre (pirates), setting (the Caribbean), and tone (mixing of humor,
 26

27 ⁵ Plaintiffs’ poster mock-up further confirms they were also copying from the 1995
 28 Carolco Pictures pirate-romance movie *Cutthroat Island*. (See Dkt. 133-1 [McDonald
 Report] at 5.) Plaintiffs have never claimed they were authorized to take from *The
 Goonies* or *Cutthroat Island*, so these elements must also be filtered out.

1 particularly physical comedy, with action involving guns, ships, swords, etc.). To be
 2 sure, these elements are generic to pirate stories and are not protectable. But,
 3 Plaintiffs’ claim against WDP rests on equivalent similarities between the Screenplay
 4 and the Motion Picture. (E.g., Dkt. 112-6 (hereafter “Román Report”) at 19 (“The
 5 Screenplay’s setting is primarily located on the Caribbean seas.”).) If the Court
 6 accepts Plaintiffs’ view that these elements can be protected, then Plaintiffs’
 7 infringement of the Ride is much more extensive than what Plaintiffs confessed.

8 This case is on all fours with *Anderson*, where the plaintiff wrote a spec
 9 treatment for *Rocky IV*, then sued Sylvester Stallone for developing his own *Rocky IV*
 10 film. The court rightly rejected this gambit: “Plaintiff has written a treatment which
 11 is an unauthorized derivative work. This treatment infringes upon Stallone’s
 12 copyrights and his exclusive right to prepare derivative works which are based upon
 13 these movies [*Rocky I, II, and III*].” 1989 WL 206431, at *11. As in *Anderson*,
 14 “[s]ince [the Screenplay] is an unauthorized derivative work, no part of [it] can be
 15 granted copyright protection.” *Id.* at *8 (title capitalization removed). In other words,
 16 all of the Screenplay must be filtered. Otherwise WDP’s “right to copy (or to permit
 17 others to copy) its own creations would, in effect, be circumscribed” by Plaintiffs’
 18 derivative work. *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980).

19 This case demonstrates the policy behind this rule: “prevent[ing] what might
 20 otherwise be an endless series of infringement suits posing insoluble difficulties of
 21 proof.” *Pickett*, 207 F.3d at 406. “Consider two translations into English of a book
 22 originally published in French. The two translations are bound to be very similar and
 23 it will be difficult to establish whether they are very similar because one is a copy of
 24 the other or because both are copies of the same foreign-language original.” *Id.*

25 Plaintiffs attempt to exploit presumed “difficulties of proof” resulting from the
 26 Screenplay and Motion Picture being “translations” of the same source material (the
 27 Ride). Suppose the Plaintiffs had not titled the Screenplay “Pirates of the Caribbean,”
 28 had not tried to capture the “image and expectations families associate with the

1 Disney ride,” had not “incorporate[ed]” the Ride’s “basic elements,” and had not
 2 copied verbatim its signature song, dialogue, scenes, and imagery as “Ride
 3 references,” and had not named its protagonist Rascal Scoundrels after a “Yo Ho”
 4 lyric. Suppose they had not set their Screenplay in the Caribbean and grounded it in
 5 the pirate genre, with its well-established tropes and *scenes a faire*. Even the most
 6 aggressive plaintiff would not claim that the Motion Picture infringed a slapstick
 7 picaresque screenplay entitled, for example, “Six Orphan Urchins Find a Dad” simply
 8 because both had a prologue, a romance, and a betrayal. But, that is what this case
 9 would be absent Plaintiffs’ unauthorized use of the Ride.

10 Finally, even if the Screenplay is not *entirely* filtered out (as it should be), then
 11 at least the common elements between the Ride and the Screenplay must be filtered.

12 **2. The Aspects of the Screenplay on Which Plaintiffs’ Claim** 13 **Rests Are Unprotectable Ideas, Tropes, and *Scenes a Faire*.**

14 In their first complaint Plaintiffs attached a list of purported similarities
 15 between the Screenplay and the *Pirates of the Caribbean* franchise. (Dkt. 1-5.) In
 16 granting WDP’s motion to dismiss on substantial similarity grounds, the Court
 17 acknowledged that it was obligated to “filter out and disregard the non-protectable
 18 elements” in making its substantial similarity determination. (Dkt. 93 at 4.) Guided
 19 by that principle, the Court carefully analyzed Plaintiffs’ list of similarities and
 20 concluded that all of them—from ghost pirates and sea monsters to a Caribbean
 21 setting and rum-loving pirate captains—were “unprotectable elements” that were
 22 common in the pirate genre. (*Id.* at 7, 9, 17.) After these unprotectable elements were
 23 filtered out, what remained were “random similarities scattered throughout the parties’
 24 works” (*id.* at 18), which as a matter of law cannot establish substantial similarity.
 25 *See Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984) (lists of random
 26 similarities between works are “inherently subjective and unreliable”).

27 Following the Ninth Circuit’s call for expert testimony on the tropes and stock
 28 elements of the pirate genre, Plaintiffs took a new tack, premising their claim of

1 substantial similarity on the report of their expert Román. (FAC ¶¶ 80–81.) But, as
 2 Román freely conceded at his deposition, he made *no effort* to distinguish between
 3 protectable and unprotectable elements, as the extrinsic test for substantial similarity
 4 requires. (DSUF 164–66.) In fact, Plaintiffs’ counsel instructed him *not* to attempt to
 5 distinguish between protectable and unprotectable elements. (Dkt. 139 at 2.) As a
 6 result, virtually all of the similarities identified in Román’s report are unprotectable
 7 ideas that are also genre tropes.⁶ For example, Román opines: both the Screenplay
 8 and the Motion Picture have an “ironic and humorous tone”; both have villains who
 9 are “cunning and sinister,” but “retain a high level of individual charisma”; and both
 10 “feature pirate ships with skeleton crews.” (Román Report at 7, 8, 11.) None of these
 11 elements is protectable: no author can monopolize a rhetorical device like irony, stock
 12 traits like cunning or charisma, or genre tropes like ghost ships. *Benay*, 607 F.3d at
 13 624–25 (“themes that are staples of literature” must be filtered out); *Kouf v. Walt*
 14 *Disney Pictures & Television*, 16 F.3d 1042, 1046 (9th Cir. 1994) (substantial
 15 similarity requires that characters resemble each other “in detail,” not in “superficial”
 16 ways); *Mattel*, 616 F.3d at 913 (“unoriginal components aren’t protectable”).

17 Compounding the deficiency of his substantial similarity analysis, Román made
 18 no effort whatsoever to survey pirate works to identify the tropes, common elements,
 19 and *scenes a faire* of the genre, as the Circuit instructed. (DSUF 167.) Instead,
 20 Román opined that considering other works in the pirate genre is misguided because
 21 “other pirate movies *are irrelevant to this case*.” (DSUF 148 (emphasis added).)
 22 That, of course, is flatly wrong under governing Ninth Circuit law.

23 Because the extrinsic test filters elements “borrowed from another author, from
 24

25 _____
 26 ⁶ In many instances, Román identifies “similarities” between elements that this Court
 27 has rightly determined are unprotectable. (*Compare* Román Report at 19 (opining that
 28 “[t]he Screenplay’s setting is primarily located on the Caribbean seas,” on ships, and
 “[t]he Screenplay’s setting is primarily located on the Caribbean seas,” on ships, and
 “in the cave where the climatic [*sic*] battle ensues”), with Dkt. 93 at 17 (“[T]he
 settings of the parties’ works aboard ships in the Caribbean and in a cavern are
 unprotectable because they flow from the natural premise of a story based on Disney’s
 Pirates of the Caribbean theme park ride.”).)

1 the ‘public domain,’ or which are otherwise not a plaintiff’s original expression,”
 2 *Rice*, 148 F. Supp. 2d at 1052, courts ruling on substantial similarity routinely canvass
 3 other works in the genre to identify stock elements that are not protectable. *See, e.g.,*
 4 *Bethea v. Burnett*, 2005 WL 1720631, at *12–14 (C.D. Cal. June 28, 2005)
 5 (unoriginal elements “done on other reality television programs such as *Big Brother*,
 6 *Survivor* and *The Real World*” were “unprotected ‘staples’ of the reality television
 7 genre” that could not receive protection). Hence the Circuit’s remand for expert
 8 testimony about other genre works to “help inform” the Court on whether various
 9 elements “are unprotected generic, pirate-movie tropes.” *Alfred*, 821 F. App’x at 729.

10 Because Román misunderstood the law and consciously avoided learning about
 11 other works in the pirate genre, he failed to realize that purported similarities he
 12 identified were well-established stock elements or *scenes a faire* in pirate stories, as
 13 McDonald’s report describes in detail. (*See generally* Dkt. 133-1 (hereafter
 14 “McDonald Report”) at 23–30.)

15 For example, Román claims that one of the “innovations” found in both works
 16 is that the male characters combine the “swashbuckler” with the “pirate.” (Román
 17 Report at 9.) This is no innovation, as McDonald’s survey of the pirate genre shows;
 18 the “swashbuckling pirate” has been common for at least a century, and pirates with
 19 chivalric or heroic qualities appear in foundational genre works like *Treasure Island*,
 20 *Captain Blood*, and *Captain Singleton*. (McDonald Report at 25–26.)

21 Similarly, Román opines that the two works are similar because both “begin[]
 22 with a prologue”—which he describes as “an incredibly unusual literary device”—
 23 “that introduces some of the main characters and sets up some of the plot points that
 24 will be explored throughout the story.” (Román Report at 13; Gray Decl. Ex. B
 25 [Román Dep.] at 199:9–10.) The prologue, of course, has been a common literary
 26 device since the ancient Greeks. But, even within the pirate genre, prologues set in
 27 the past that set the scene for the action to come are commonplace, including in works
 28 that Plaintiff’s original pleading cited as major works of the genre. (*See* McDonald

1 Report at 28 (describing prologues in, *inter alia*, *Captain Blood* and *Yellowbeard*); *see*
 2 *also* Dkt. 1 ¶¶ 8, 10 (recognizing these as significant pirate works).)

3 At times, Román’s ignorance of, and failure to study, the pirate genre lead him
 4 to absurd propositions that contradict Plaintiff’s own pleadings. For instance, Román
 5 opines that a “major innovation[]” of the Screenplay is “[t]he element of romance,”
 6 and that the Screenplay and the Motion Picture are substantially similar because both
 7 “focus on the heterosexual romance between the male and female leads as much as
 8 they do the antagonistic duals [*sic*] between the two male pirate leads.” (Román
 9 Report at 18.) But Plaintiffs themselves pleaded that “the majority” of pirate films
 10 “have a love story/triangle” (Dkt. 1 ¶ 10)—a genre fact confirmed by McDonald’s
 11 report, which shows that romance plots have been ubiquitous in the pirate genre since
 12 the 18th century. (*See* McDonald Report at 27–28.) Likewise, *contra* Román’s claim
 13 that Plaintiffs invented a hybrid swashbuckler-pirate, Plaintiffs pleaded that “[f]ilms
 14 have covered swashbuckling pirates.” (Dkt. 1 at ¶ 10.)

15 In sum, only the opinions of WDP’s expert assist the Court in applying the
 16 extrinsic test by identifying the stock elements, tropes, and *scenes a faire* of the pirate
 17 genre. Because Plaintiffs’ expert is unfamiliar with the genre and avoided surveying it
 18 in forming his opinions—and because he eschewed the entire task of distinguishing
 19 between protectable and unprotectable elements—his opinions offer no basis on which
 20 to conclude that the Screenplay is substantially similar to the Motion Picture. Both
 21 common sense and McDonald’s thorough survey of the pirate genre confirm what the
 22 Ninth Circuit required of the parties, and none of the purported similarities identified
 23 in Román’s report—from generic narrative elements like romance plots and prologues
 24 to genre tropes like skeletons and treasure caves—is original or protectable.

25 Plaintiffs have argued the Court should apply the “selection and arrangement
 26 test,” *instead of* the extrinsic test, and thus cannot filter generic elements. That is
 27 mistaken: the extrinsic test is mandatory in the Ninth Circuit and *always* focuses
 28 “only on the protectable elements of the plaintiff’s expression.” *Rentmeester*, 883

1 F.3d at 1118. The selection-and-arrangement doctrine reflects only that, in certain
 2 rare circumstances, the specific “selection, coordination, and arrangement of
 3 unprotectible elements” may itself be so unusual, original, and distinctive as to
 4 constitute protectable expression under the extrinsic test. *See L.A. Printex Indus., Inc.*
 5 *v. Aeropostale, Inc.*, 676 F.3d 841, 849 (9th Cir. 2012), *abrogated on other grounds*
 6 *as recognized in Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 959 F.3d 1194,
 7 1198 (9th Cir. 2020). Here, the Screenplay’s selection and arrangement of
 8 unprotected elements is not strikingly distinct. To the contrary, it is simply a
 9 collection of tropes that commonly appear together in the pirate genre, arranged in a
 10 standard narrative. Even Román’s opinions, such as that the prologue is set in the past
 11 and introduces the action, reveal only convention. (Román Report at 13.)

12 **B. The Works Are Not Substantially Similar as a Matter of Law**

13 **1. All of the *Funky Films* Factors Favor WDP**

14 In its prior order, this Court carefully considered the eight *Funky Films* factors
 15 and determined there were no substantial similarities between the works’ plot, themes,
 16 dialogue, mood, setting, pace, characters, and sequence of events. (Dkt. 93 at 6–18.)

17 The Court’s analysis remains correct. The only new evidence Plaintiffs offer is
 18 Román’s report, which, as noted, merely lists generic and unprotectable similarities
 19 and makes no effort to distinguish original and unoriginal elements of the pirate genre.
 20 His method is “inherently subjective and unreliable” and cannot substitute for a
 21 holistic examination of the works. *See Litchfield*, 736 F.2d at 1356; *accord Williams*
 22 *v. Crichton*, 84 F.3d 581, 589–90 (2d Cir. 1996) (judgment as a matter of law on lack
 23 of substantial similarity between the film *Jurassic Park* and plaintiff’s book about a
 24 dinosaur theme-park, despite “scattershot” identification of similarities).

25 ***Plot and Sequence of Events.*** The dissimilarity between the Screenplay and
 26 the Motion Picture is most evident on the dimensions of plot and sequence of events.
 27 The plots of the two works have virtually nothing in common. The Screenplay’s plot
 28 centers on a ragtag group of kids, the Rascal Scoundrels, who dream of becoming

1 pirates.⁷ The plot’s action revolves around the search for two halves of a treasure
 2 map: Nefarious is searching for his former partner Davey Jones (believing that he has
 3 the other half of the map), while the Scoundrels (who actually have Jones’s half of the
 4 map) are searching for Nefarious’s half. The searches collide on Calavera Island,
 5 where the Rascals find the second half of the map but are captured by Nefarious.
 6 Jones ultimately redeems himself, rescues the children, and defeats Nefarious. The
 7 Rascals learn that piracy does not pay, and form a quasi-family with Jane and Jones.

8 The Motion Picture’s plot does not involve a children’s coming-of-age arc, nor
 9 the corollary arc of an irresponsible caretaker of children cleaning up into a proper
 10 father. Nor are any of the specific plot beats for the Rascals (common to “gang of
 11 ragtag kid” movies like *The Goonies*, *The Sandlot*, *Stand By Me*, etc.) in the Disney
 12 movie. There is no divided map or a race to uncover riches. Instead, there is
 13 Barbossa’s quest to break an ancient curse of living death by *returning* treasure,
 14 Sparrow’s effort to *resume* a life of piracy aboard the *Black Pearl*, and Will and
 15 Elizabeth’s striving to break from stifling social constraints.

16 Román’s report opines that the “most obvious similarit[y]” between the plot and
 17 sequence of events in the two works is that “both scripts feature pirate ships with
 18 skeleton crews.” (Román Report at 11.) As this Court previously held, the idea of
 19 skeleton pirates—in addition to being a frequent element of acclaimed works in the
 20 genre, *see* McDonald Report at 26–27—is drawn from the Ride.⁸ (Dkt. 93 at 7.) And
 21 Nefarious’s pirates are *not* skeletons; they are flesh-and-blood men with face paint.
 22 *Supra* at 7–8. Other similarities that Román identifies—battle scenes, a romance
 23 subplot, a younger character seeking out a mentor, a prologue—are random, non-
 24

25 ⁷ Plaintiffs’ own pitch letter acknowledged that this *Goonies*-like band of children was
 26 the central conceit of their Screenplay, describing their work as “Goonies meets
 Pirates of the Caribbean.” (DSUF 91.)

27 ⁸ The same is true of the other “significant” overlapping plot point that Román
 28 identifies—a denouement in a “remote and ominous cave that is inaccessible except
 by small boats,” (Román Report at 18.) That literally describes the Ride, but because
 Román had never heard of, seen, or ridden the Ride, he had no idea of that.

1 specific similarities isolated from two works that tell fundamentally different stories.
 2 And they are nonspecific ideas and pirate-genre tropes. (McDonald Report at 26–29.)

3 **Characters.** The protagonists of the Screenplay include the six Rascal
 4 Scoundrels, who have no counterpart in the Motion Picture. *Cf. Benay*, 607 F.3d at
 5 627 (citing as significant the “number of important characters in the Film and the
 6 Screenplay who have no obvious parallel in the other work”). A protagonist of the
 7 Motion Picture, Will (an upright adult ally and rival to Sparrow) has no counterpart in
 8 the Screenplay. Recognizing this problem, Román focuses on purported similarities
 9 between Jones and Sparrow, on the one hand, and Nefarious and Barbossa, on the
 10 other. (Román Report at 7–11.) But, as the Court previously concluded, to the extent
 11 these characters have any similarity at all, those similarities (e.g., that both Jones and
 12 Sparrow are “drunkard[s] of ... questionable morality,” Román Report at 8) are “non-
 13 distinct” characteristics that are not protectable. (Dkt. 93 at 9.) They are also traits
 14 commonly applied to characters in the pirate genre. (McDonald Report at 24–25.)

15 By contrast, the differences between these characters are substantial. Davey
 16 Jones is a conventional hero going from bad to good: by the end, he sobers up, quits
 17 piracy, rescues the Rascals, treats Jane right, and goes forth “as a privateer [i.e., a
 18 pirate hunter] with his newfound family at his side.” (DSUF 112.) Sparrow subverts
 19 conventional hero tropes—he lies constantly, shifts his loyalties unpredictably, and
 20 pursues self-interest always. Far from renouncing piracy to become a family man and
 21 sea cop, he ends the movie on the lam, retaking the *Black Pearl* and *resuming* piracy.

22 Likewise, Nefarious and Barbossa have little in common beyond the fact that
 23 they are both pirate villains. As the Court recognized (Dkt. 93 at 10–12), Nefarious
 24 and Barbossa are different in every particular, from the way they look to the way they
 25 speak. And their motivations are fundamentally different: Nefarious, like most pirate
 26 villains in literature, seek to *obtain* lost treasure to enrich himself, while Barbossa
 27 seeks to *return* treasure to free his crew from a terrible curse.

28 Román also compares Elizabeth to Jane, but the only similarities he can muster

1 are broad ideas: “lively,” “spirited,” and “resilient.” (Román Report at 10.) These
 2 traits are common to the pirate genre (McDonald Report at 26), and the women are not
 3 similar. Elizabeth is a governor’s daughter who chafes against her upper-class life and
 4 ultimately helps Sparrow resume piracy, while Jane is a pirate and tavern-worker
 5 (described as a “harlot”) who renounces piracy to become a mother to the Scoundrels.

6 **Themes.** The fundamental dissimilarity between the Screenplay and the Motion
 7 Picture is reflected in the works’ divergent themes. As befits a children’s story, the
 8 Screenplay is overtly moralistic, with clear villains and heroes and the basic theme
 9 that greed and piracy are bad, family and law enforcement are good. The Motion
 10 Picture is far more morally ambiguous; its central theme is that individuals will
 11 always pursue liberation from constraints. (See McDonald Report at 15–17.)

12 The only common theme Román identifies is “mentorship of male orphans.”
 13 (Román Report at 12.) This is a “plot idea, which copyright law does not protect,” not
 14 a theme. See *Marcus v. ABC Signature Studios, Inc.*, 279 F. Supp. 3d 1056, 1067
 15 (C.D. Cal. 2017). Further, orphaned boys are common in the genre and found in
 16 works like *Peter Pan*, *Captain Blood*, and *Captain Singleton* (see McDonald Report at
 17 28), all identified by Plaintiffs as seminal to the genre. (See Dkt. 1 ¶ 8, 10.) At any
 18 level of specificity, the relationship between Jones and the Rascal Scoundrels bears no
 19 resemblance to the relationship between Sparrow and his adult rival Will.

20 **Dialogue.** “To show substantial similarity based on dialogue, a plaintiff must
 21 establish ‘extended similarity of dialogue.’” *Shame on You Prods., Inc. v. Elizabeth*
 22 *Banks*, 120 F. Supp. 3d 1123, 1156 (C.D. Cal. 2015), *aff’d*, 690 F. App’x 519 (9th Cir.
 23 2017). This Court held that Plaintiffs’ Screenplay “does not include dialogue similar
 24 to the dialogue from Defendants’ Films.” (Dkt. 93 at 14–15.) Román opines “there
 25 are ... moments when characters in the Disney Film echo the words written in the
 26 Screenplay,” but identifies none. (Román Report at 19–20.) The only overlapping
 27 dialogue is taken from the Ride, which Román would not recognize.

28 **Mood.** The Screenplay is a work for children, and it has a lighthearted mood to

1 match: much of the Screenplay is spent with the Rascals cracking jokes, engaging in
 2 slapstick comedy, and solving puzzles. As the Court recognized, the mood of the
 3 Motion Picture is “much darker.” (Dkt. 93 at 16.) Its humor comes from Sparrow’s
 4 sharp wit and off-kilter manner, not goofy kids farting, stuttering, or being illiterate.

5 **Setting.** Román opines that the Screenplay and the Motion Picture are both set
 6 in the Caribbean, on ships, and in a cave. (Román Report at 19.) These are *scenes a*
 7 *faire* in a pirate story, which also come from Disney’s Ride. (See McDonald Report at
 8 29; Dkt. 93 at 16–17); *see also Cavalier*, 297 F.3d at 824 (night sky setting was
 9 unprotectable *scene a faire* where it “necessarily flows from the basic plot premise”).

10 **Pace.** Román opines that both works are “fast-paced.” (Román Report at 19.)
 11 Both works have adventure story pacing, but the action in the Screenplay is much
 12 faster-paced. The Rascals reach Calavera Island on page 65 of the Screenplay, and
 13 just 10 pages later, they have Nefarious’s map in hand—having hiked through a
 14 jungle, crossed a ravine over crocodile-infested water, and broken into the “Pit of the
 15 Dead.” The action in the Motion Picture develops more slowly in more varied locales.

16 2. This Case Is Controlled by *Funky Films* and *Benay*

17 The substantial similarity issue here is controlled by two canonical Ninth
 18 Circuit copyright cases, *Funky Films* and *Benay*. In both cases, the Ninth Circuit
 19 affirmed summary judgment for the defendant on substantial similarity, despite the
 20 parties having submitted competing expert reports on substantial similarity.

21 The plots of the works at issue here have far less in common than the works at
 22 issue in *Funky Films* and *Benay*. In those cases, the works had essentially *identical*,
 23 and highly specific, premises. In *Funky Films*, 462 F.3d at 1077–78, both works told
 24 the story of a small funeral home operated by two brothers after the sudden death of
 25 their father. The works in *Benay* were even more similar (607 F.3d at 625):

26 Both have identical titles; both share the historically unfounded premise
 27 of an American war veteran going to Japan to help the Imperial Army by
 28 training it in the methods of modern Western warfare for its fight against
 a samurai uprising; both have protagonists who are authors of non-fiction
 studies on war and who have flashbacks to battles in America; both

1 include meetings with the Emperor and numerous battle scenes; both are
 2 reverential toward Japanese culture; and both feature the leader of the
 3 samurai rebellion as an important foil to the protagonist. Finally, in both
 4 works the American protagonist is spiritually transformed by his
 5 experience in Japan.

6 Notwithstanding these extensive similarities, in both cases the Ninth Circuit
 7 held that close examination of *how* the works elaborated on their similar premises
 8 revealed that the works were *dissimilar* as a matter of law. In *Funky Films*, the court
 9 concluded that the plaintiff’s work was “a murder mystery,” while the defendant’s
 10 work was a drama about the characters struggling to deal with “the cataclysmic death
 11 of the father.” 462 F.3d at 1078. In *Benay*, the court likewise concluded that the same
 12 narrative premise was executed differently in the two works—one was “largely a
 13 revenge story,” while the other was a “captivity narrative.” 607 F.3d at 626.

14 Here, the works do not share anything like the factually detailed common
 15 premises as the works in *Funky Films* and *Benay*. Fundamentally, the Screenplay is a
 16 children’s movie: it is about a band of orphans that teams up with a down-on-his-luck
 17 caretaker to find a treasure map, defeat an evil pirate captain, recover lost treasure,
 18 and form a family. By contrast, *Curse of the Black Pearl* is not about children at all; it
 19 tells the story of the morally ambiguous, idiosyncratic, antihero Sparrow, who battles
 20 the cursed pirate captain Barbossa as Sparrow strives to regain command of his pirate
 21 ship and Barbossa strives to break an ancient curse of living death.

22 Upon reviewing the two works at the motion to dismiss stage, this Court
 23 concluded that “they tell very different stories.” (Dkt. 93 at 9.) That judgment was
 24 spot-on. The works here do not share even the significant superficial similarities as
 25 the works in *Funky Films* and *Benay*—cases that resulted in affirmed summary
 26 judgments for the defendants. *Funky Films* and *Benay* control the result here, and
 27 compel the conclusion that the works are not substantially similar as a matter of law.

28 VI. CONCLUSION

WDP respectfully requests that the Court enter summary judgment in favor of
 WDP and against Plaintiffs.

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